UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

UNITED STATES POSTAL SERVICE,		
Respondent,	**Case No.**	**07-CA-232299**
and		
CENTRAL MICHIGAN AREA LOCAL 300, AMERICAN POSTAL WORKERS UNION (APWU), AFL-CIO,	**Date:**	**February 25, 2020**
Charging Party		

RESPONDENT'S REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent hereby files this Reply Brief to General Counsel's Answering Brief to Exceptions Filed by Respondent, pursuant to Section 102.46(h) of the NLRB's Rules and Regulations. In its Answering Brief, General Counsel essentially argues that the ALJ "correctly" or "properly" decided every issue she addressed in her decision. Indeed, General Counsel extensively quotes from the ALJ's decision without directly addressing any of the arguments raised by Respondent in its Exceptions.

For example, at pages 8-9 of her decision, the ALJ cited Piedmont Gardens for the proposition that "an employer must determine in each case whether any given investigation witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, or there is a need to prevent a cover up" and then concluded that management here made no such determination. Respondent, in turn, cited the Board's recent decision in Apogee Retail LLC, 368 NLRB No. 144 (Dec. 16, 2019), which overturned Banner Estrella Medical Center, 362 NLRB 1108 (2015), and criticized the very language relied upon by the ALJ:

> By requiring an employer to engage in a case-by-case assessment of whether the integrity of the investigation will be compromised without confidentiality, the Board in Banner Estrella ignored the obvious need to protect employee witnesses and the integrity of sensitive workplace investigations. Indeed, the Board disregarded the reality that a preliminary investigation is necessary in order to determine whether 'witnesses need protection, evidence is in danger of being destroyed, testimony is in danger of being fabricated, and there is a need to prevent a cover up.' Since the employer would not, at the outset, have the information it needs to make that determination, under Banner Estrella it is unable to provide the very assurances of confidentiality necessary to obtain the information it needs to make the determination Banner Estrella demands.

Apogee Retail LLC, supra, at p. 5.

Furthermore, while the Apogee Board did not directly address Piedmont Gardens, that case and Banner Estrella both instituted the same case-by-case balancing test, prompting the Apogee Board to say "[w]e would consider revisiting that decision if the issue is raised in a future case." General Counsel, however, did not address Apogee in its Answering Brief or in any way attempt to distinguish Apogee, factually or legally, from the case at hand.

As another example, at pages 10-11 of her decision, the ALJ found that Respondent's reliance on Weingarten was "misplaced" and specifically found "that it is reasonable ... to extend Weingarten to employees and/or their union representatives seeking pre-interview information concerning the charges leveled against them as long as such extension does not impede the investigation." Respondent, in turn, pointed out that the Supreme Court, in Weingarten, specifically held to the contrary:

> The employer has no duty to bargain with the union representative at an investigative interview. The representative is present to assist the employee and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's account of the matter under investigation.

Weingarten, 420 U.S. 251, 260 (1975).

Respondent further cited to Cowles Communications, 172 NLRB 1909 (1968), which holds that the "duty to furnish ... information stems from the underlying statutory duty imposed on employers and unions to bargain in good faith with respect to mandatory subjects of bargaining." Thus, if an employer has no duty to bargain with the union representative at an investigative interview, it cannot be obligated to furnish the union representative with requested information. General Counsel, however, did not address Cowles or this argument in his Answering Brief.

Likewise, Respondent cited to multiple cases holding that, while Weingarten permits an employee to consult with a union representative and to be informed of the subject matter of the interview, it does not permit the union to request information from the employer, or get a list of the questions to be asked, prior to an investigative interview. Specifically, as held by the Board:

> To require that the employer inform the employee as to the subject matter of the interview does not dictate anything resembling 'discovery.' The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A *general* statement as to the *subject matter* of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.

Pacific Telephone and Telegraph Co., 262 NLRB 1048, 1049 (1982), aff'd, 711 F.2d 134 (9th Cir. 1983).

Once again, however, General Counsel did not address these findings in Weingarten or Pacific Telephone, or address at all other decisions or advice memos cited in Respondent's Exceptions.

WHEREFORE, based on the foregoing, Respondent maintains that the instant complaint should be dismissed in its entirety and General Counsel has proffered nothing in its Answering Brief to warrant a different conclusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this this 25th day of February, 2020, I served Respondent's foregoing Reply as follows:

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